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80-1285
No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARL W. BROWN, - - - - - Petitioner

versus

EARL J. HARTLAGE, - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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January 26, 1981

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QUESTIONS PRESENTED

1. Does Kentucky Revised Statute (KRS) 121.055, as interpreted by Kentucky courts in voiding Petitioner's election for a campaign promise to serve as a public official for a salary which is less than permitted, violate the guarantee of unencumbered political speech accorded by the First and Fourteenth Amendments to the Constition of the United States upon grounds of vagueness and overbreadth?
2. Is there a clear and present danger to a compelling state interest such as to warrant the censoring of political speech protected by the First and Fourteenth Amendments to the Constitution of the United States of sufficient magnitude as to void Petitioner's election where Petitioner made a campaign promise, retracted four days later, seventy-eight days prior to the election, to serve as a public official for less than permitted?
3. Have the Kentucky Courts in the voiding of Petitioner's election interpreted KRS 121.055 in such manner as to violate the guarantee of unencumbered political speech accorded by the First and Fourteenth Amendments to the Constitution of the United States, for a campaign promise to serve as a public official for a salary which is less than permitted, by creating artificial distinctions for different forms of political speech?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

CARL W. BROWN, - - - - - *Petitioner*

v.

EARL J. HARTLAGE, - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, Carl W. Brown ("Petitioner"), prays a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Kentucky entered on August 8, 1980; a rehearing of which was denied by that Court on October 29, 1980. A Motion for Discretionary Review of this matter to the Supreme Court of Kentucky was denied by that Court on December 8, 1980.

OPINIONS BELOW

The final judgment and opinion of the Kentucky Court of Appeals (Kentucky's intermediate appellate court) entered on August 8, 1980, is not reported but appears in the Appendix hereto. App. A, p. 21. The denial of and the opinion upon the Petition for Rehearing to the Kentucky Court of Appeals entered on

October 29, 1980, is not reported but appears in the Appendix hereto. App. B, p. 30. The order denying Discretionary Review to the Supreme Court of Kentucky (Kentucky's highest appellate court) entered on December 8, 1980, is not reported but appears in the Appendix hereto. App. C, p. 33.

JURISDICTION

The final judgment and the opinion of the Kentucky Court of Appeals in this matter was entered on August 8, 1980. A seasonable Petition for Rehearing was denied on October 29, 1980, and a seasonable Motion for Discretionary Review to the Kentucky Supreme Court was denied on December 8, 1980. This Petition is filed within ninety (90) days of December 8, 1980 and of October 29, 1980. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

- *United States Constitution*
  - *First Amendment:*

    "Congress shall make no law . . .; or abridge the freedom of speech; or of the press; . . .".
  - *Fourteenth Amendment, Section One:*

    ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

• State Statute in Question

•• *Kentucky Revised Statute (KRS) 121.055:*

"No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other things of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree, or make a contract with any person to vote for or support any particular individual, thing, or measure, in consideration for the vote or for the financial support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract."

• *Notice Required*

The facial or interpretive constitutionality of KRS 121.055 is drawn into issue by this matter and pursuant to 28 U.S.C. §2403(b) and Rule 28.4(c) of the Rules of this Court this Petition for Writ of Certiorari has been served upon the Attorney General of the Commonwealth of Kentucky.

STATEMENT OF THE CASE

This matter is a request for relief from the final judgment of the Kentucky Court of Appeals, Kentucky's intermediate appellate court, from which the Supreme Court of Kentucky refused a Motion for Discretionary Review and thus, allowed the decision of such intermediate court to become the law of this case.

The matter at bar involved an election contest in Jefferson County, situs of the City of Louisville. Respondent Hartlage, an incumbent Commissioner[1] of Jefferson County, Kentucky, was defeated for such office by the Petitioner in the November 6, 1979 election by a plurality of 10,151 votes.

Hartlage sued in the Jefferson Circuit Court to void the election. He alleged that Petitioner, and Petitioner's running mate for the office of Jefferson County Commissioner, Dr. Bill Creech ("Creech"), had made a public statement which violated KRS 121.055. App. G, p. 50. This was denied in Petitioner's Answer, and Federal constitutional issues were raised. App. H, p. 53.

Petitioner and Creech in an August 15, 1979 press conference stated that Respondent had increased the County Commissioner's salary to $20,000.00 per annum during his incumbency and had created a new position of Executive Assistant to all County Commissioners at a cost of $34,000.00 per annum. Petitioner and Creech criticized the substantial increase in the cost of operation of the Jefferson County Commissioners' Office during Respondent's term, pledged to reduce their salaries by $3,000.00 per annum each and reorganize the Commissioner's Office for a total annual savings to the taxpayers of $172,000.00 during the term of office they sought. App. I, p. 59.

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[1]In Kentucky, the office of County Commissioner is elective. KRS 67.040. App. E, p. 45. In Jefferson County, Kentucky, there are three such Commissioners who with the County Judge/Executive form the legislative branch of County government. KRS 67.083. App. F, p. 46.

Four days later, on August 19, 1979, the statements were fully retracted by the Petitioner and Creech at another press conference. App. J, p. 62.

In the election on November 6, 1979, Petitioner defeated Respondent by a plurality of 10,151 votes. *Creech was defeated.*

Respondent filed his Petition to void Petitioner's election on December 4, 1979. The matter was tried before the Jefferson Circuit Court in a bench trial on January 29, and 30, 1980. The trial court observed, inter alia, that after the retraction of August 19, 1979, Petitioner never again stated that he would reduce his salary as Commissioner. The trial court noted that during the remainder of the campaign, Respondent[2] directly questioned Petitioner as to the salary reduction statements and Petitioner repeated his retraction of August 19, 1979. App. D, p. 37.

The trial court upon reviewing the whole record, found that based upon:

> ". . . (1) the almost immediate retraction by Brown; (2) no subsequent retreat by Brown from the retraction; (3) balancing the violation against the disenfranchisement of thousands of votes; (4) the presumption of the people on the election process; and (5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements

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[2]The trial court found Respondent had himself violated at least one provision of the Kentucky Corrupt Practices Act, but held such violation de minimis non curat lex.

in the same county-wide election; . . . Brown was fairly elected." App. D, p. 41.

The trial court in reliance upon *Sparks* v. *Boggs*, Ky., 339 S. W. 2d 480 (1960), found a violation of KRS 121.055 and held the Petitioner's statement was an unlawful promise to the electorate; but, despite the rationale of *Sparks*, Petitioner was fairly elected. Court costs were assessed against the Petitioner.

Respondent appealed to the Kentucky Court of Appeals which held that the ruling of the trial court should be reversed pursuant to KRS 121.055 as interpreted by *Sparks* v. *Boggs, supra.*[3]

The Kentucky Court of Appeals also dismissed Petitioner's cross-appeal because of the failure of the Petitioner to file a supersedeas bond.[4] Judgment of the Court of Appeals was entered on August 8, 1980.

A seasonable Petition for Rehearing was filed with the Kentucky Court of Appeals. On October 29, 1980, the Petition for Rehearing was denied. The denial, however, was qualified by an opinion wherein the Court questioned its decision and its reliance upon *Sparks* v. *Boggs, supra,* as being unconstitutionally broad and

[3]KRS 121.055 is of 1974 vintage. *Sparks* was decided in 1960 under then KRS 123.040, the precursor of the current statute, which in working form was noted by the Kentucky Court of Appeals to be almost identical to the current statute.

[4]Although the Petitioner's cross-appeal was dismissed by the Kentucky Court of Appeals, the First and Fourteenth Amendment issues were raised by affirmative defense in Petitioner's answer, briefed to the Kentucky Court of Appeals and advanced to the Kentucky Supreme Court. Thus, these issues were not mooted by a dismissal of the cross-appeal.

an unconstitutional limitation on free speech. Further, the court invited direction from the Kentucky Supreme Court (Kentucky's highest appellate court) observing that the issue was one which should be resolved by a court which had the power to overturn or modify *Sparks*. App. B, p. 31.

Petitioner seasonably moved the Kentucky Supreme Court for Discretionary Review which was denied on December 8, 1980.[5] The issuance of the mandate was stayed by the Kentucky Court of Appeals until March 9, 1981, so that Petitioner could seek relief from this Court. App. M, p. 67 and App. N, p. 68. On December 16, 1980, Petitioner's Motion for Substitution of Counsel was granted. App. O, p. 69.

All Federal issues were appropriately and seasonably raised by Petitioner in his answer at the trial court level; App. H, p. 53, and at all stages of the appellate proceedings.

REASONS FOR GRANTING THE WRIT

I. The Interpretation and Application of KRS 121.055 by the Kentucky Courts Is Not in Accord With Previous First Amendment Decisions of This Court.

• *Political Speech Is a Fundamental First Amendment Right.*

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[5]Under Kentucky procedure, denial of a Petition for Discretionary Review by the Kentucky Supreme Court causes the mandate of the Kentucky Court of Appeals to be forthwith issued. Kentucky Rules of Civil Procedure ("KRCP") 76.30(2)(b), App. K, p. 64, unless a stay be granted by that court. KRCP 76.44. The maximum time for stay of mandate is ninety (90) days. KRCP 76.44(b), App. L, p. 66.

This Court defined political expressions and the protection to be afforded them in *Mills* v. *Alabama,* 384 U. S. 214 (1966), as:

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." pp. 218, 219.

See also: *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765 (1978); *Buckley* v. *Valeo,* 424 U. S. 1 (1976); *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1971).

Not only may a candidate raise such deprivation upon his own behalf; the candidate may also raise the rights of his constitutents. See: *Bullock* v. *Carter,* 405 U. S. 134 (1972).

* * * * * * *

This Court has historically disallowed restraint upon speech where statutes and interpretations of statutes: (1) are vague and overbroad; (2) contain no judicial finding that there is a "clear and present danger" to a compelling state interest; and (3) create unreal distinctions between forms of political expression, based upon speech content or the speaker.

That the statements in issue here were political expressions is beyond cavil. The matter at bar contains elements of all three categories of disallowed restraint upon fundamental First Amendment rights.

II. The Kentucky Courts' Interpretation and Application of KRS 121.055 Is Vague and Overbroad.

• *The Interpretation of KRS 121.055 Is Impermissibly Vague and Overbroad.*

This Court, in both civil and criminal matters, has consistently held that a statute which mandates or prohibits action in terms so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application" violates the essentials of due process. *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926). The inherent danger of vagueness is magnified when its impact is upon political speech. In *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961), this Court teaches:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by a lawful means, an opportunity essential to the security of the republic, is a fundamental principle of our Constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit punishment for the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." pp. 287, 288.

See also: *Colautti* v. *Franklin*, 439 U. S. 379 (1979); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Ashton* v. *Kentucky*, 384 U. S. 195 (1966); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

* * * * * * * *

In the matter at bar, the Petitioner's election was voided by the Kentucky courts for alleged violation of KRS 121.055. The Kentucky Court of Appeals relied heavily upo. *Sparks* v. *Boggs, supra.* In likening *Sparks* to the matter at bar it held that Petitioner's salary was fixed by law and therefore he could not legally reduce his salary. Therefore, his statement to do so was a promise to the taxpayers to "reduce pro tanto the amount of taxes each taxpayer must pay." App. A at p. 25. In reaching this decision, the Kentucky Court must have parsed the statute to read:

> "No candidate * * * shall promise * * * things of value * * * to any person * * * in consideration of a person's vote."

KRS 121.055 warns of nothing! There is no self-contained means in the statute by which a reader of common intelligence could judge its impact. It leaves a candidate in a position to either act at risk or not act at all and be deprived of Constitutional rights.

The Kentucky court did not address the issue of clarity head-on. Instead, it relied upon *Sparks* v. *Boggs, supra,* as giving notice to the Petitioner that this form of political expression has been held to be

violative of a statute similar to KRS 121.055, despite the fact that *Sparks* was decided fourteen years prior to the adoption of the current statute and was factually different from the matter at hand. In *Sparks,* the offending office-seekers offered to serve for $1.00 per year, which was interpreted as an offer of free service, and they offered to channel the savings to select groups in the community rather than apply the savings to the general fund for the benefit of all taxpayers, as was done here. Clearly, being aware of *Sparks* and that the precursor statute was operationally the same as the current statute is of no help. Common intelligence would dictate that there was no correlation between the unlawful conduct complained of in *Sparks* and the alleged unlawful conduct of the Petitioner.

It must follow then that KRS 121.055 is facially vague and overbroad and that the interpretation placed upon it by the Kentucky courts is also vague and overbroad.

III. The Kentucky Courts Have Not Applied the Clear and Present Danger Test Mandated by This Court.

• *In Areas of Restraint on Political Speech, This Court Mandates a Balancing of the Compelling State Interest Against the Clear and Present Danger to Such Interest.*

This Court has spoken upon a plethora of matters dealing with circumscription of advocacy of unlawful activity by means of speech and conduct. From its decisions, it has evolved the balancing mechanism of

"clear and present danger." The mere advocacy of unlawful conduct is insufficient for a state to create restraints upon First Amendment rights of speech. More is required. There must be a clear and present danger that the advocated unlawful conduct will conflict with the state's compelling interest in the area which the state seeks to regulate. The test has been used in numerous instances to protect First Amendment rights in varied fact situations. Thus, in *Thornhill* v. *Alabama,* 310 U. S. 88 (1940) and *Dejonge* v. *Oregon,* 299 U. S. 353 (1937), the test was used in labor organizational efforts; in *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1971), it was used in a criminal libel action; in *Communist Party of Indiana* v. *Whitcomb;* 414 U. S. 441 (1974) and *Baird* v. *State Bar of Arizona,* 401 U. S. 1 (1971), it was used in cases involving the advocacy of the violent overthrow of the government; and, in *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) and *Garner* v. *Louisiana,* 368 U. S. 157 (1961) it was used to protect speech and conduct in civil rights demonstrations.

In practical application, this Court mandates that the state court discern whether actual facts exist which present a clear and present danger to the state's compelling interest.

In *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829 (1978), the functions of the legislative and judical branches of government in creating and reviewing statutes impacting First Amendment rights were explained thus:

> "A Legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so, whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and the press would be subject to legislative definition and the function of the First Amendment as a check on Legislative power would be nullified." p. 844.

By the mandate of this Court, it is no longer permissible for a state court to impose sanctions simply because a state statute so requires where protected First Amendment speech is concerned. In short, the court is required to hear proof that the proscribed speech presents an imminent danger to the state's compelling interest of such magnitude as to warrant the circumscription of First Amendment rights.

* * * * * * * *

Assuming arguendo, Petitioner's statements were unlawful at the time they were made, the Kentucky Court of Appeals has still erred and has disregarded this Court's teachings as to the balancing of such statements against the compelling state interest—protection of the electoral process. There has been no inquiry as to the impact of the statements in issue upon that compelling interest. Statutory sanctions have been imposed—without more.

Petitioner's alleged illegal statement was made on August 15, 1979 and the retraction on August 19, 1979,

seventy-eight days prior to the election of November 6, 1979. The election resulted in a plurality of 10,151 votes for the Petitioner and a defeat for his running mate Creech, who had made the same statements. Throughout all proceedings in this matter, Petitioner maintained that even if his statement were unlawful, it was retracted in time to have no effect upon the election process which was the state's only compelling interest. The trial court agreed and declared Petitioner validly elected with findings that conclusively show that there was no clear and present danger to the state's compelling interest. App. J, p. 60.

The Kentucky Court of Appeals in direct contravention of this Court's holdings, refused to consider this evidence, announcing:

> "The other considerations of the trial court likewise have no applicability. As previously discussed in this opinion retraction of the illegal statement, and no retreat from the retraction is of no consequence under the law of the state; likewise, there is no authority to disregard a mandatory statute because of balancing the violation against disenfranchisement, presumption of will of the people and defeat of Brown's running mate who made the same statement. Neither can we agree that Brown was fairly elected in face of his violation of the Corrupt Practices Act." App. A, p. 27.

Such reasoning is unacceptable. The Kentucky Court of Appeals found the statute mandatory. Ipse dixit,

it voided Petitioner's election. However, under the rulings of this Court, the Kentucky Court of Appeals abdicated its responsibility to balance the compelling state interest against a clear and present danger to the integrity of the electoral process. The net effect of such abdication by the judicial branch of government to the legislative branch is a failure to utilize the First Amendment safeguards prescribed by this Court.

IV. The Kentucky Courts Create Artificial Distinctions as to the Legality of Different Forms of Political Speech Inconsistent With the Decisions of This Court.

• *The Interpretation Placed Upon the Statute Allows Some Forms of Political Speech and Not Others.*

This Court condemns artificial distinctions as to legality of political speech based upon subject matter. In *Police Department of Chicago* v. *Mosely,* 408 U. S. 92 (1972), the City, by Ordinance, attempted to restrict picketing in front of schools for any purpose other than labor disputes, this court in finding such a distinction objectionable, reasoned:

> "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored and more controversial ideas. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard'." p. 96.

See also: *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953) and *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). Thus, this Court mandates the elimination of artificial distinction based upon content of speech.

* * * * * * * *

Literally read, KRS 121.055 prohibits any candidate from making any promise or offering anything of value to the electorate, either directly or indirectly, in consideration for votes. The Kentucky appellate courts now interpret the Petitioner's statement to reduce his salary as an offer to the general populous to reduce taxes. App. A, p. 25. The required logical extension of this concept is that any promise to reduce taxes by any candidate is a violation of the statute. Presumably, such an interpretation prevents any promise by any candidate to pare waste or seek other economies in government. This prohibition could also be directed to such items as increased services or increased benefits. We are constrained to the rhetorical inquiries: Would a commitment to increase aid to elderly violate the statute? Would a commitment to seek industry to create additional jobs violate the statute? Obviously then, by the literal interpretation of the statute adopted by the Kentucky appellate courts, no candidate for political office in the Commonwealth of Kentucky is privileged to make any promise as to any political or economic change his election to public office would bring.

We are sure that this Court will take judicial notice that since the enactment date of the statute

under scrutiny (1974), Kentucky has had numerous elections. Kentucky is no different than the remaining states of the Union. Its political process is viable and active. Elections involve fierce contests in which normal political promises are made by each candidate. However, now Kentucky holds that a promise to serve for less than is permitted is a promise to reduce taxes on a pro tanto basis and as such, is an unacceptable promise. But, promises to provide for good administrative services, encourage businesses to locate in Kentucky, provide aid for the elderly or jobs are presumably acceptable. Thus, by its decision in the matter at bar, Kentucky has established two standards of political speech—based upon the genre of the campaign promise.

This is an unacceptable distinction.

• *The Kentucky Courts Implicitly Interpret KRS 121.055 to Restrict Expression of a Candidate's Political Speech But Not the Political Speech of Others.*

This Court, in *First National Bank of Boston* v. *Belotti, supra,* recently protected the corporate right to engage in the political process, bottoming its reasoning upon the issue, not the speaker. There, this Court held:

> "If the speakers here were not corporations, no one would suggest that the state court silence their proposed speech. It is the type of speech indispensible to decision making in a democrary, and this is no less true because the speech comes from a corporation rather than an individual. The in-

herent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." p. 777.

Thus, we are taught that a distinction based upon the status of the speaker is an invalid distinction.

* * * * * * *

Here, implicit in the interpretation of the statute in issue by the Kentucky appellate courts, is that only candidates may not make promises to the electorate. There is no prohibition against citizens, citizen groups or other organizations who may or may not advocate the same ideas as candidates. Certainly, there are those banded together in political action groups advocating ideas such as economy in government, and other betterments to the common weal who are presumably privileged to speak. Thus, while a candidate in Kentucky may not be privileged to address the ideas advocated by any of the citizens groups, non-candidates may address such ideas with impunity. This is a distinction based upon the status of the speaker. In Kentucky, then, the inherent worth of the speech is dependent upon the identity of the source. The distinction is artificial!

Petitioner concedes that Kentucky has a substantial interest in protecting the integrity of the electoral process but urges that where the concepts advocated by special interest groups are protected and these same concepts advocated by candidates are proscribed, there

is an illusory difference. If a subject is a valid subject for discussion by one then it must be a valid subject for discussion by all. Any holding to the contrary is a distinction as to the source of the statement and is unconstitutional.

V. Kentucky Courts Have Decided an Important Issue of Federal Law Which Has Not Been Addressed by This Court.

• *This Is a Case of First Impression.*

This case presents to this Court an issue as to the assertion of a candidate's First Amendment right to address the public and the deprivation of this right by state statute as interpreted by a state court. This Court has not addressed this unique issue before. A subsidiary issue is that of the rights of the voting public. While this matter comes to this Court from Kentucky, it is not alone in its misperception of First Amendment rights. In 1940, Nebraska, in *State ex rel. Burkett* v. *Swanson,* 291 N. E. 481 (Neb., 1940), accorded with the current Kentucky position. However, in neither *Burkett,* nor *Sparks* v. *Boggs, supra,* both of which were relied upon by the Kentucky court, was the Federal constitutional guarantee of the First Amendment raised. This issue was raised in the matter at Bar and was decisionally ignored for the rationale contained in *Sparks,* although as Petitioner has earlier observed, the Kentucky Court of Appeals was not without some reservation. It felt that Petitioner's contention was not without logic or appeal and requested

the Kentucky Supreme Court to review the matter. App. B, p. 31.

Your Petitioner addressed the issue to the Kentucky Supreme Court which had the power to overturn or modify *Sparks* v. *Boggs, supra,* by a Motion for Discretionary Review. Such Motion was not granted by the Kentucky Supreme Court and it implicitly finds no fault with the decision of the Kentucky Court of Appeals.

Accordingly, Petitioner urges that if the issue is to be put to rest, and Petitioner's First Amendment rights vindicated, it must be done here.

CONCLUSION

For any one or all of the reasons hereinabove set forth, minimally, a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION RENDERED: AUGUST 8, 1980; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

REVERSING

BEFORE: VANCE, HOGGE and GUDGEL, Judges.

HOGGE, JUDGE: On November 6, 1979, Carl W. Brown defeated Earl J. Hartlage in an election for Jefferson County Commissioner for the C-District. Hartlage contested the election of Brown on the grounds of a public statement made by Brown and his running mate, Dr. Bill Creech, which he alleged violated the Kentucky Corrupt Practices Act. Brown and Creech had stated at a televised press conference on August 15, 1979 that they intended to cut their own salaries by $3,000.00 per year if elected. In an August 19, 1979 news conference, after being alerted to possible legal questions, they retracted the statement. Hartlage contended that the statement violated KRS 121.055. The Jefferson Circuit Court, although finding a violation of this section of the Corrupt Practices Act, adjudged

pursuant to KRS 120.165(4) that Brown had been fairly elected and refused to void the election. Hartlage appeals. A cross-appeal filed by Brown has been dismissed by reason of his failure to file a supersedeas bond.

The trial court found that Brown violated KRS 121.055. KRS 121.055 provides:

> No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The appellee, by his brief and oral argument, insists that the trial court erred in this holding and also its holding that the appellant could maintain this contest action as appellant himself, "violated certain provisions of the Corrupt Practice Act." Both these arguments appear to be matters to be considered on cross-appeal, which has previously been dismissed in this case by this court. Be that as it may, we agree with the finding of the trial court that all the defenses raised by the appellee "failed to block Hartlage from asserting the claim in the Petition either legally or equitably." The appellee either failed to prove his asserted defenses, or there had been substantial compliance or the violation, if any, was "de minimis."

Appellee contends that the trial court erred in determining that Brown had violated KRS 121.055. He relies

on *Owsley* v. *Hill*, 210 Ky. 285, 275 S. W. 797 (1925). In that case Hill, a candidate for county attorney, proposed to have the fiscal court reduce the salary of the office by $400.00, and to have the court allot that sum to the county road fund. (The salary for the term of office for which Hill was campaigning had not been set in the manner required by law.) In that case, the statement was held not to be a violation of the Corrupt Practices Act.

After the decision in *Owsley* v. *Hill, supra*, the court interpreted KRS 123.040, a statute with wording almost identical to KRS 121.055, in *Sparks* v. *Boggs*, Ky., 339 S. W. 2d 480, 484 (1960). In that case, it was held that a promise by candidates for the office of city commissioner, whose salaries were fixed by statute, to serve for $1.00 per year and to vote to have the $2,000.00 savings to be distributed to specified religious, educational, charitable and recreational programs violated the Corrupt Practices Act. The election was held to be void. The court explained its holding as follows:

> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to consitute a violation of the Corrupt Practices Act. To hold otherwise would permit the various elective public offices to become filled by those who would purchase their election thereto by making the most extravagant bid. The auction method of choosing a public officer would supplant the personal fitness test. Eventually most of the public offices would be occupied by the opulent, who could afford to serve without pay, or by the ambitious, who would serve only for the pittance of honor attached

> to the office, or by the designing grafter, who would surely obtain his remuneration by methods which would not bear scrutiny. Under such a system good government would certainly vanish from every subdivision of the state.

In *Sparks* v. *Boggs*, the court explained the distinction between that case and *Owsley* v. *Hill, supra*, which resulted in a different disposition of the litigation:

> *The material difference* between the case of *Owsley* v. *Hill*, and the one at bar is that the annual salary of a commissioner for Hazard *had already been fixed by law* for the new term, whereas such had not been done in respect to the county attorney's office in controversy in *Owley* v. *Hill*.
>
> . . . .
>
> As their rate of pay had already been legally fixed at $500 per year, the amount of salary they were entitled to receive upon taking office could not be altered. Section 161 of the Constitution of Kentucky plainly prohibited such contemplated action npon their part. The pertinent language of that section reads: "The compensation of any city, county, town, or municipal officer shall not be changed after his election or appointment; or during his term of office; * * *." The word "changed" implies that the compensation of an official may not be scaled up or scaled down. See also Section 235 of the Constitution of Kentucky. In view of the quoted constitutional inhibition, appellees gave out to the electorate a pledge they could not abide by. . . . [Emphasis added.]

It is quite apparent that the salary for this office was, like the salary in *Sparks* v. *Boggs*, fixed by law. KRS

64.530(4) states that salaries for county officers elected by popular vote shall be set by the fiscal court "not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term. . . ." Brown promised to do an act that he could not legally do. Further, his statement was a promise to the taxpayers to reduce pro tanto the amount of taxes each taxpayer must pay. It is stated in *Sparks* v. *Boggs, supra:*

> The general rule on the question before us is thus stated in 43 Am. Jur., Public Officers, sec. 374, p. 159: "An agreement by a candidate for office that if chosen he will discharge the duties of the office without compensation or for a lesser compensation than that provided by law, or will pay part of his salary into the public treasury, is illegal, whether made in good faith or not. The underlying principle of the decisions (on this point) is that when a candidate offers to discharge the duties of an elective office for less than the salary fixed by law, a salary which must be paid by taxation, he offers to reduce pro tanto the amount of taxes each indivdiual taxpayer must pay, and thus makes an offer to the voter of pecuniary gain.
>
> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act.

It is clear that although Brown may have acted in good faith the trial court correctly held he had in fact violated the Corrupt Practices Act. Under this statute and our case

law, this court cannot reach any conclusion other than the appellee violated KRS 121.055.

What was the effect of that violation? KRS 120.015 provides that in contest actions, where it is alleged that the provisions of KRS 121.055 were violated, and upon trial it appears that the provisions have been violated by the contestee or by others in his behalf with his knowledge, *the nomination or election of the contestee shall be declared void.* Violations of the Corrupt Practices Act through promises similar to the one made by Brown resulted in voiding of elections in *Draughn* v. *Martin,* Ky., 350 S. W. 2d 161 (1961); *Sparks, supra,* and *Kluemper* v. *Zimmer,* 240 Ky. 225, 41 S. W. 2d 111 (1931). We find no exception in the statute where the statement is retracted, nor do we find any Kentucky case indicating that retraction is a defense. Although the retraction received similar publicity, there is no way of knowing whether it reached the same members of the voting public who heard the original statement. In litigation initiated to compel the Nebraska Secretary of State to accept one Burkett's filing as a candidate, the Supreme Court of Nebraska held that Burkett should not be on the ballot in spite of his offer to repudiate a statement that he would serve without pay so long as the budget remained unbalanced. *State ex rel. Burkett* v. *Swanson,* 291 N. W. 481 (Neb. 1940). We hold that the retraction did not constitute a defense.

The trial court held, and appellee insists, that KRS 120.165(4) is inconsistent with KRS 120.015 and applying KRS 120.165(4) after reviewing the whole record, Brown was fairly elected and KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

These conclusions and holding are clearly erroneous. KRS 120.165(4) has no applicability to this action as this contest was brought under and tried under KRS 120.015. This latter statute specifically treats the violation of the

Corrupt Practices Act, charged herein, viz. KRS 121.055. As between legislation of broad and general nature and legislation dealing minutely with specific matter on the other hand, the specific prevails over the general. *City of Bowling Green* v. *Board of Education of Bowling Green Independent School District,* Ky., 443 S. W. 2d 243, 247 (1969). If there is any inconsistency, which we fail to find, then the inconsistency must be resolved in favor of the specific statute, KRS 120.015, which mandatorily requires voiding of an election where KRS 121.055 is violated by the contestee.

The other considerations of the trial court likewise, have no applicability. As previously discussed in this opinion, retraction of the illegal statement, and no retreat from the retraction, is of no consequence under the law of this state; likewise there is no authority to disregard a mandatory statute because of balancing the violation against disenfranchisement, presumption of will of the people and defeat of Brown's running mate who made the same statements. Neither can we agree that Brown was fairly elected in face of his violation of the Corrupt Practice Act.

The law and courts look with disfavor on disfranchisement and this is very true in this case. Although considerations of good faith and balancing of rights may be proper in a contest under KRS 120.165(4), they have no applicability here because, as already pointed out, this action bas based on violation of KRS 121.055, one of the specifically identified prohibited acts under KRS 120.015. There is no authority under this section to entertain such defenses. The only result the court can adjudge is to void this election and to hold otherwise is error. *Sparks* v. *Boggs, supra; Brewer* v. *Compton,* Ky., 122 S. W. 2d 1024 (1938).

The final question for consideration is whether Brown's statement is protected by the United States Constitution. To hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression.

> Constitutional rights of liberty of speech and of the press are subject to such reasonable regulations as are necessary to promote and preserve public welfare. The preferred position of freedom of speech does not require legislators to be insensible to claims by citizens to comfort and convenience. A state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace. 16 Am. Jur. 2d *Constitutional Law* §409.
>
> It is well settled that the rights of free speech and press are subject to legislative restriction, within proper limits. The First Amendment does not forbid a regulation which ends in no restraint upon expression or in any other evil outlawed by the Amendment's terms and purposes. It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. And the prohibition of legislation against free speech is not intended to give immunity for every use or abuse of language, the right of free speech and press does not prevent the punishment of those who abuse this freedom, and does not imply the right to paralyze the means for effective protection of all the freedoms

secured by the Bill of Rights, nor the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all depends. 16 Am. Jur. 2d *Constitutional Law* §507.

We hold that the statement was not constitutionally protected.

The judgment is reversed with directions to enter a new judgment voiding the appellee's election.

ALL CONCUR.

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APPENDIX B

OPINION RENDERED: OCTOBER 29, 1980
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

OPINION AND ORDER DENYING PETITION FOR REHEARING—Entered October 29, 1980

BEFORE: HOGGE, GUDGEL and VANCE, Judges.

GUDGEL, JUDGE. In his Petition for Rehearing the appellee contends that this Court has misconceived fifth amendment freedom of speech issues and overlooked recent decisions of the United States Supreme Court applicable thereto. Specifically, appellee relies upon *Consolidated Edison Co.* v. *Public Service Commission*, ____ U. S. ____, 48 USLW 4776 (June 20, 1980); *First National Bank* v. *Bellotti*, 435 U. S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978); and *Buckley* v. *Valeo*, 424 U. S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), none of which were cited to this Court in his original brief.

The cases relied upon by appellant are not controlling when applied to the factual situation which is present in this case. Without question a state may not censor what a candidate for public office may say to the electorate. There is a compelling state interest, however, in the fairness and integrity of elections, and a state may require that elections be conducted free of corruption and bribery.

Our state has defined by statute what constitutes corruption in an election. It condemns an attempt to buy votes. Our highest court has specifically held that a promise by a candidate to take a reduction in the salary set by law for an elective office and a promise to discharge the duties of the office without pay is so vicious in its tendencies as to constitute a violation of the Corrupt Practices Act. The court's reasoning is premised on the belief that such a promise is an attempt to buy votes or to bribe the voters. *Sparks* v. *Boggs*, Ky., 339 S. W. 2d 480 (1960). We are bound by that decision. The refusal of this Court to follow precedent established by our Supreme Court would constitute nothing less than judicial anarchy.

The cases relied upon by appellee do not hold, and appellee does not go so far as to argue, that a state does not have a constitutional right to void an election for bribery simply because the offer of the bribe involved the use of speech. What appellee really argues is that the holding of *Sparks* v. *Boggs, supra*, is unconstitutionally broad for the reason that a holding in 1980 that a promise to serve in office at reduced pay can be equated with vote buying is an unconstitutional limitation on the freedom of speech. If carried to its logical extreme, he contends, any promise by a candidate to increase the efficiency and thus lower the cost of government might likewise be considered as an attempt to buy votes. This contention is not without logic or appeal, but since it strikes at the heart of *Sparks* v.

Boggs, supra, it must be addressed to a court which has the power to overturn or modify that decision.

The Petition for Rehearing is DENIED.

ALL CONCUR.

/s/ Paul D. Gudgel
Judge, Court of Appeals

ENTERED: October 29, 1980

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APPENDIX C

SUPREME COURT OF KENTUCKY

80-SC-770-D
(80-CA-385-MR)

CARL W. BROWN - - - - - - - *Movant*

v.

EARL J. HARTLAGE - - - - - *Respondent*

Jefferson Circuit Court
No. 79-CI-11292

ORDER DENYING DISCRETIONARY REVIEW—
Entered December 9, 1980

The motion of Carl W. Brown for a review of the decision of the Court of Appeals is denied.

Palmore, C. J., and Aker, Clayton, Lukowsky, and Stephenson, JJ., sitting. All concur.

ENTERED: December 9, 1980.

/s/ John S. Palmore
Chief Justice

APPENDIX D

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL W. BROWN - - - - - - - *Defendant*

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

This case was tried, pursuant to KRS 120.165, on January 29 and 30, 1980, without a jury, and is of record.

On December 4, 1979, the plaintiff-contestant, Earl J. Hartlage, filed a petition against the defendant-contestee, Carl W. Brown, alleging that Brown violated the Kentucky Corrupt Practices Act, specifically, KRS 121.055. Because of the violation, Hartlage demands that Brown's election to the office of Jefferson County Commissioner, "C" District, be voided, and the office vacated by Brown. (KRS 120.155 restricts the filing of a suit over a contest of a regular election to any candidate, provided that the candidate obtained not less than 25% of the votes cast for the successful candidate. *Dietz* v. *Zimmer,* 231 Ky. 546, 21 S. W. 2d 999 limits the suit for bringing the action to a defeated candidate.)

Both Hartlage and Brown were their respective party's nominees for the office in question from "C" District. "C" District encompasses an area generally referred to as the

southwest portion of Jefferson County, Kentucky. Hartlage was the Democratic nominee, and Brown, the Republican.

In the general election of November 6, 1979, Brown defeated Hartlage, the incumbent, by 10,151 votes. The candidates were voted for by the County-wide electorate; however, their primary races were confined to their respective district.

During the regular election campaign, on August 15, 1979, Brown, along with Dr. Bill Creech, "B" District Republican candidate, held a televised press conference and made the following statements:

Mr. Brown: ". . . with state law limiting their authority and responsibility (referring to County Commissioners) to legislation (KRS 67.080), it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that part-time Commissioners nevertheless see fit to pay themselves the same amount as that paid the full-time County Judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify these payments."

". . . using the gray fringes of the law for his own personal gain, Hartlage led the move to funnel County tax dollars into Commissioners' pockets."

Brown, during the same conference, supported and acquiesced in the following statement of Dr. Bill Creech:

Dr. Creech: "We abhor the Commissioners' outrageous salaries, and to prove the strength of our convictions, one of our first official acts as County Commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each per year."

Later in the conference Brown went on to say, "These 2 proposals—cutting our own salaries and reorganizing the

Commissioners' office staff will save the taxpayers over $172,000 during our first term of office."

The Sunday after the press conference, a friend of Brown called to inform him that he may have violated the Corrupt Practices Act by making the statements mentioned in the press conference. Brown, a lawyer, personally researched the matter and concluded that a valid question could be raised on the statements as to whether they were violations. A retraction by Brown and Creech was made at a televised press conference on August 19, 1979. Partial statements are as follows:

"We are men enough to admit when we've made a mistake. We have discovered that there are Kentucky Court decisions . . . which indicate that our pledge to reduce our salaries, if elected, may be illegal." ". . . we do hereby rescind our pledge to reduce the County Commissioner's salary, if elected, and instead, pledge to seek corrective legislation in the next session of the general assembly, to correct this silly provision of state law."

The Court will judicially note that Dr. Bill Creech was defeated by Jim "Pop" Malone in the regular election for "B" District Commissioner.

There is no Kentucky case law concerning the effect, if any, of a repudiation or retraction of this type pledge or promise to the public. However, a Nebraska case, *State ex rel. Burkett* v. *Swanson*, 291 N. W. 481 (1940) stands for the proposition that a withdrawal of a statement of this nature cannot be treated as a defense, but this precedent is not binding upon the Court.

The Court will comment on the retraction and repudiation of the offer to reduce the salary. The retraction press conference of August 19, 1979, when reviewed, was not that of a remorseful penitent. The retraction statement did not admit a violation, or that the statements were violations,

but that the statements raised a reasonable question of violation as a result of silly law. The retraction accused the branches of government of being in cahoot with one another and scratching one another's back. Brown and Creech further said that if there was a violation in what was said, Hartlage caused the violation by doubling his salary after his previous election.

The Petition further alleged that Brown made other statements in public concerning the salary reduction pledge; however, the Court finds no substance to this allegation. The evidence is plain that whenever the issue was discussed again, it was repudiated, and when it was discussed, the matter in controversy was put to Brown either by Mr. Hartlage at subsequent meetings of candidates, or by persons from an audience in a public forum. The evidence reveals no retreat by Brown from the retraction and repudiation that was publicly made August 19, 1979.

Brown, by his response to this action, offered various defenses to the allegation in the Petition. He admitted the statements were made on August 15, 1979. He asserts that the reduction in salary is within the confines of prescribed law; that there was no claim to serve without compensation, but contends the salary should be consistent with the duties of the office, which would dictate a reduction in salary; that Hartlage has no standing to bring the suit because he violated the Corrupt Practices Act himself, under KRS 120.-155, and therefore, the equitable doctrine of "clean hands" would apply and deny Hartlage's right to contest this election. Brown further contended that the retraction of August 19, 1979, cured any violation, if one existed.

The Court finds the defense is without substance. It was alleged that Hartlage made an agreement, contrary to law, with the Greater Louisville Central Labor Council, and with the Department of Human Services Employees Association for his endorsement in the election. The alleged

agreement concerned a commitment by Mr. Hartlage over collective bargaining rights for governmental employees. Actually, the evidence was to the contrary. It's also alleged that Hartlage failed to make election finance disclosures in a proper way by not filing the reports with the County Clerk, although the reports had been filed with the Registry. This was found to exist but was cured within a reasonable time after it was discovered, and the law was complied with. Therefore, the Court finds substantial compliance on this point. (See *Roberts* v. *Byrd,* 344 S. W. 2d 378 (1961).)

The only violation of Hartlage, about which Brown complains, really worth comment is the failure of Hartlage to have the disclaimer on his campaign locomotive. But this violation is so insignificant it does not reach the dignity of precluding Hartlage from bringing this suit. This violation is found by the Court to be *de minimis.*

In all, the defenses raised fail to block Hartlage from asserting the claim in the Petition either legally or equitably.

Therefore, one issue now before the Court is whether the pledge of Brown, in the statement of August 15, 1979, is a violation of the Corrupt Practices Act.

KRS 121.055 states as follows:

> *Candidates prohibited from making expenditure or loan, or agreement as to action when elected, to secure vote or support.*—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in con-

sideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The Court answers the above question in the affirmative. *Sparks* v. *Boggs*, 339 S. W. 2d 480 (1960), is explicit on this point. It states, "It appears to us there can be no escape from the conclusion that a promise to take a reduction in salary set by law for an elected public office . . . advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act."

This leads us to the question as to whether the Commissioner's salary, as mentioned by Brown in his pledge, was set by law. There is no question in the Court's mind concerning this issue either, and the Court finds that the Commissioner's salary was set by law. KRS 64.530(5) fixes the monthly compensation of County officers elected by popular vote. The Commissioners are therein included. Further, KRS 64.527 permits the equating of Commissioners' salaries to present value of the purchasing dollar, or adjusting the compensation based upon the "rubber dollar" theory. To otherwise find would require manipulation of the law by legal gymnastics which this Court is unable to perform.

So, the Court having found there was a promise to reduce Brown's salary as set by law, it naturally follows there was a violation of the Corrupt Practices Act, specifically, KRS 121.055, and this finding is in compliance with the rationale of *Sparks* v. *Boggs, supra.*

Now, the question is whether the election of Brown should be voided and his office vacated. Hartlage argues that it's an automatic voiding of the election and vacating

of the office if a violation of this nature is found to exist. The cases cited refer to this type of promise as a bribery, and the only remedy, according to Hartlage, is the relief demanded by his Petition. Hartlage is not without legal support in that KRS 120.015 states that if a violation occurs the election shall be declared void.

The Court generally agrees with Hartlage except for the end result. The Court does not adjudge that the election should be voided and the office vacated. The Court's explanation is as follows:

There is reasoning given to us in *Owsley* v. *Hill*, 275 S. W. 797 (1925), that if the promise to reduce salary is made to the public at large, there is no violation. All other cases cited were promises of a reduction in salary for the benefit of specific groups and to accomplish a particular purpose. The beneficiaries in those cases included widows and orphans, religious groups, retarded children, Little League baseball, the hiring of a city manager, and so forth. In *Owsley* the candidate promised to reduce to a previously fixed sum and transfer the savings to a road fund for the County. Our highest Court said, "We cannot feel that this statute refers to promises made the entire people, and to hold otherwise would prevent any candidate from pledging himself to support measures designed to correct evils of which the people were complaining."

The *Sparks* case, however, appears to overrule *Owsley*, so it is inescapable to conclude that a violation of the Corrupt Practices Act did not occur. But the Court resists the proposition that automatic voiding of the election must necessarily follow because the Court further concludes that the law requires more.

KRS 120.165(4) states:

> If it appears from an inspection of the whole record that there has been such . . ., *bribery* . . . in the

> conduct of the election that neither contestant nor contestee can be judged to have been fairly elected, the Circuit Court . . ., may adjudge that there has been no election.

The Court is led to believe that this statutory provision is inconsistent with KRS 120.015. KRS 120.165(4) speaks of bribery and the *Sparks* case and *Kluemper* v. *Zimmer*, 41 S. W. 2d 1115 (1931), declare these promises to be bribery. Applying KRS 120.165(4) further, and reviewing the whole record, considering the following:

1) the almost immediate retraction, by Brown;
2) no subsequent retreat by Brown from the retraction;
3) balancing the violation against disenfranchisement of thousands of votes;
4) the presumption of the will of the people in the election process; and
5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements in the same county-wide election;

the Court adjudges, pursuant to KRS 120.165(4), that Brown was fairly elected. KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

Previously, the Court faintly criticized Brown for saying the law is silly. Therefore, the Court will refer to the law as unique when the Court tries to grasp the reasoning of the legislature in these statutes. Under KRS 120.015, and since only a defeated candidate may file suit to contest the election, and further conditioned upon the defeated candidate obtaining 25% of the successful candidate's votes cast, if the successful candidate's promise is big enough, and the defeat is resounding enough, then there can be no contest over the violation.

Therefore, in keeping with the seriousness of the matter as the law so clearly requires, the defendant-contestee, Brown, is adjudged to have violated KRS 121.055; however, for the reasons above stated, his election is not voided. Further, in keeping with the seriousness of the condemnation of his campaign promise, the costs of this action shall be taxed against him. Either counsel may prepare judgment consistent herewith, with notice to opposing counsel.

/s/ Michael O. McDonald
Judge

Date:

cc: Victor L. Baltzell, Jr.
Richard D. Remmers

JEFFERSON CIRCUIT COURT

DIVISION SEVEN

No. 79-CI-11292

EARL J. HARTLAGE - - - - - - - - *Plaintiff*

v.

CARL BROWN - - - - - - - - *Defendant*

JUDGMENT

This cause having come on for a hearing before the Court, arguments for the Plaintiff and the Defendant having been fully presented, and the Court having entered its findings of fact and conclusions of law and opinion on February 6, 1980,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The findings of fact and conclusions of law and opinion entered on February 6, 1980, are incorporated herein by reference as if set out verbatim herein;

2. The relief sought in the petition is denied;

3. The election of Carl W. Brown as Commissioner of the Jefferson County Fiscal Court from C District, Jefferson County, Kentucky, is upheld;

4. The Defendant, Carl W. Brown, shall pay the costs of this action;

5. That pursuant to CR 54.02 this is a final and appealable order and there is no just reason for delay in its entry or execution.

/s/ Michael O. McDonald
Judge

Date: February 12, 1980

Tendered by:

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APPENDIX E

FISCAL COURTS

67.040. Fiscal Court—Members—Presiding Officer—Deadlock.—(1) The fiscal court of each county shall consist of the county judge/executive and the justices of the peace of the county; or of the county judge/executive and three (3) county commissioners elected under KRS 67.050 and 67.060.

(2) The county judge/executive shall preside, if present. A majority of the justices of the peace or commissioners shall elect one (1) of their number to preside during the absence or inability of the county judge/executive to preside. If any person fails to comply with a lawful order of the fiscal court, the circuit court, on application of the county judge/executive, may compel obedience by proceedings for contempt.

(3) When there is a tie vote in the fiscal court in the selection of any officer or employe to be selected by the fiscal court, and a deadlock results and continues for fifteen (15) days or longer, the county judge/executive shall cause to be entered upon the minutes of the fiscal court an order reciting the facts as to the deadlock, and the question upon which it has occurred and exists, and thereupon, the county judge/executive shall make such appointment. (1833, 1836, 1837: amend. Acts 1942, ch. 173, §§ 1, 2; 1952, ch. 224, §1; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1978; 1978, ch. 118, §7, effective June 17, 1978; 1978, ch. 384, § 141, effective June 17, 1978.)

APPENDIX F

67.083. Additional Powers of Fiscal Courts.—(1) It is the purpose of this section to provide counties as units of general purpose local government with the necessary latitude and flexibility to provide and finance various governmental services within those functional areas specified in subsection (3) of this section, while the general assembly retains full authority to prescribe and limit by statute local governmental activities when it deems such action necessary.

(2) The fiscal court of any county is hereby authorized to levy all taxes not in conflict with the Constitution and statutes of this state now or hereafter enacted.

(3) The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, the fiscal court of any county may enact ordinances, issue regulations, levy taxes, issue bonds, appropriate funds and employ personnel in performance of the following public functions:

(a) Control of animals, and abatement of public nuisances;

(b) Regulation of public gatherings;

(c) Public sanitation and vector control;

(d) Provision of hospitals, ambulance service, programs for the health and welfare of the aging and juveniles, and other public health facilities and services;

(e) Provision of corrections facilities and services, and programs for the confinement, care and rehabilitation of juvenile law offenders;

(f) Provision of parks, nature preserves, swimming pools, recreation areas, libraries, museums and other recreational and cultural facilities and programs;

(g) Provision of cemeteries and memorials;

(h) Conservation, preservation and enhancement of natural resources including soils, water, air, vegetation and wildlife;

(i) Control of floods;

(j) Causing the repair or demolition of structures which present a hazard to public health, safety or morals or are otherwise inimical to the welfare of residents of the county; causing the redevelopment of housing and related commercial, industrial and service facilities in urban or rural areas; providing education and counseling services and technical assistance to present and future residents of publicly assisted housing;

(k) Planning, zoning and subdivision control according to the provisions of KRS Chapter 100;

(l) Adoption, by reference or in full, of technical codes governing new construction, renovation or maintenance of structures intended for human occupancy;

(m) Regulation of commerce for the protection and convenience of the public;

(n) Regulation of the sale of alcoholic beverages according to the provisions of KRS Chapters 241 through 244;

(o) Exclusive management of solid wastes by ordinance or contract or by both and disposition of abandoned vehicles;

(p) Provision of public buildings, including armories, necessary for the effective delivery of public services;

(q) Cooperation with other units of government and private agencies for the provision of public services, including but not limited to training, educational services and cooperative extension service programs;

(r) Provision of water and sewage and garbage disposal service but not gas or electricity; including management of onsite sewage disposal systems;

(s) Licensing or franchising of cable television;

(t) Provision of streets and roads, bridges, tunnels and related facilities, elimination of grade crossings, provision of parking facilities, enforcement of traffic and parking regulations;

(u) Provision of police and fire protection;

(v) Regulation of taxis, buses and other passenger vehicles for hire;

(w) Provision and operation of air, rail and bus terminals, port facilities, and public transportation systems;

(x) Promotion of economic development of the county, directly or in cooperation with public or private agencies, including the provision of access roads, land and buildings, and promotion of tourism and conventions;

(y) Preservation of historic structures.

(4) The county judge/executive is hereby authorized and empowered to exercise all of the executive powers pursuant to this section.

(5) A county acting under authority of this section may assume, own, possess and control assets, rights and liabilities related to the functions and services of the county.

(6) If a county is authorized to regulate an area which the state also regulates, the county government may regulate the area only by enacting ordinances which are consistent with state law or administrative regulation.

(a) If the state statute or administrative regulation prescribes a single standard of conduct, a county ordinance is consistent if it is identical to the state statute or administrative regulation.

(b) If the state statute or administrative regulation prescribes a minimal standard of conduct, a county ordinance is consistent if it establishes a standard which is the same as or more stringent than the state standard.

(c) A county government may adopt ordinances which incorporate by reference state statutes and administrative regulations in areas in which a county government is authorized to act.

(7) County ordinances which prescribe penalties for their violation shall be enforced throughout the entire area of the county unless:

(a) Otherwise provided by statute, or

(b) The legislative body of any city within the county has adopted an ordinance pertaining to the same subject matter which is the same as or more stringent than the standards that are set forth in the county ordinance. The fiscal court shall forward a copy of each ordinance which is to be enforced throughout the entire area of the county to the mayor or chairman of the board of trustees of each city in the county.

(8) The powers granted to counties by this section shall be in addition to all other powers granted to counties by other provisions of law. A permissive procedure authorized by this section shall not be deemed to be exclusive or to prohibit the exercise of other existing laws and laws which may hereafter be enacted but shall be an alternative or supplement thereto.

(9) Any agency of county government exercising authority pursuant to subsection (3) (y) of this section shall, prior to exercising such authority, obtain the voluntary written consent of the owner of the structure. Consent may be obtained only after advising the owner in writing of any advantages and disadvantages to the owner which are likely to result from the exercise of such authority. (Enact. Acts 1972, ch. 384, § 1; 1976 (Ex. Sess.), ch. 20, §6, effective January 1, 1978; 1978, ch. 118, §3, effective June 17, 1978; 1979 (Ex. Secc.), ch 22, §1, effective May 12, 1979; 1980, ch. 149, §3, effective July 15, 1980.)

APPENDIX G

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - *Plaintiff-Contestant*
4115 Bramers Lane
Louisville, Kentucky 40216

v.

CARL W. BROWN - - - - - *Defendant-Contestee*
3431 Heatherfield Drive
Louisville, Kentucky 40216

PETITION TO VOID ELECTION

Comes the Plaintiff-Contestant, Earl J. Hartlage, and for his cause of action, states as follows, to-wit:

1. That Plaintiff-Contestant and Defendant-Contestee at all times herein mentioned were opposing candidates in the general election held on Tuesday, November 6, 1979, for election to the office of Jefferson County Commissioner, C District, Jefferson County, Kentucky, the Plaintiff-Contestant and Defendant-Contestee being candidates for election to that office by reason of their nomination as candidates thereto in the preceding primary election held on Tuesday, May 29, 1979.

2. That the Defendant-Contestee, personally and/or through others in his behalf with his knowledge, on or about August 15, 1979, and at other times prior to said election, in Jefferson County, Kentucky generally and publicly de-

cared, pledged and/or promised that, if elected, he would reduce the salary fixed by law for the holder of said office and that he would serve in such capacity as county commissioner for an amount less than that fixed by law for the compensation of the holder of said office.

3. That the aforesaid declaration, pledge and/or promise constituted a corrupt election practice in violation of KRS 121.055.

4. That by reason of the Defendant-Contestee's violation of KRS 121.055, the election of the Defendant-Contestee to the office of County Commissioner, C District, Jefferson County, Kentucky, shall be declared void as is provided in Kentucky Revised Statute 120.015.

5. That at all times herein mentioned, the Plaintiff-Contestant did not violate any of the provisions of KRS 121.055 or any other section of the Kentucky Revised Statute which sets forth a corrupt election practice.

6. That the Plaintiff-Contestant is duly qualified to contest the instant election by reason of his candidacy for said office and by reason of the number of votes cast for Plaintiff-Contestant in said election was greater than twenty-five percent (25%) of the number of votes cast for the Defendant-Contestee in said election.

7. That pursuant to Kentucky Revised Statute 120.165 (1), the within action shall have precedence over all other cases pending before the Jefferson Circuit Court.

WHEREFORE, the Plaintiff-Contestant, Earl J. Hartlage, demands as follows:

1. That Judgment be entered declaring void the election of the Defendant-Contestee to the office of Jefferson County Commissioner, C District, by reason of his violation of KRS 121.055 and Section 150 of the Kentucky Constitution, and that, therefore, a vacancy exists in said office;

2. That he recover his costs herein expended;

3. That he receive any and all other relief to which he may appear to be entitled.

Connelly, Kaercher, Baltzell & Stamper

/s/ Victor L. Baltzell, Jr.
Attorney for Plaintiff-Contestant
219 Marion E. Taylor Building
Louisville, Kentucky 40202
Phone: 589-2100

I have read the foregoing Petition and the allegations contained therein are true and accurate to the best of my knowledge and belief.

/s/ Earl J. Hartlage
Plaintiff-Contestant

Subscribed and sworn to before me by Earl J. Hartlage, this the 3rd day of December, 1979.

My commission expires: December 13, 1982

/s/ Bert Stamper
Notary Public, State at Large, Kentucky

APPENDIX H

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - *Plaintiff-Contestant*

v.

CARL W. BROWN - - - - *Defendant-Contestee*

ANSWER

Comes the Defendant-Contestee, Carl W. Brown, by counsel, and for answer to the Petition herein states as follows:

FIRST DEFENSE

For specific answer to the Petition, Defendant-Contestee states:

1. Paragraph 1 of the Petition is admitted.

2. That he admits that on August 15, 1979, as part of a general platform plank criticizing the Plaintiff-Contestant's increase in salary throughout his term of office and the increased cost of operating the Jefferson Fiscal Court Commissioners' office, he did state to the public at large that he believed the salary paid the Plaintiff-Contestant for the limited duties performed by the Plaintiff-Contestant was too high and that Defendant-Contestee would not maintain the county commissioners' salary at that same level, but would serve for a salary within the confines prescribed by the Kentucky Constitution and the Kentucky Revised Stat-

utes; anything in Paragraph 2 inconsistent with the above is denied.

3. Paragraph 3 of the Petition is denied.

4. Paragraph 4 of the Petition is denied.

5. Paragraph 5 of the Petition is denied and Defendant-Contestee stated that the specific violations of the Plaintiff-Contestant are more particular set out in the following affirmative defenses.

6. With respect to Paragraph 6, Defendant-Contestee admits that Plaintiff-Contestant received more than 25% of the number of votes cast for Defendant-Contestee, but denies that Plaintiff-Contestant is duly qualified to contest the instant election by virtue of his violation of the Corrupt Practices Act as is more particularly hereinafter set out.

7. Paragraph 7 of the Petition is admitted.

SECOND DEFENSE

Defendant-Contestee affirmatively states that the statements made at a press conference on August 15, 1979 (a photostatic copy of the transcript of same is attached hereto as Exhibit A), did not constitute a violation of the Corrupt Practices Act in that:

A. The Defendant-Contestee made no promise to accept less than a sum within the range of salaries set by the Constitution and the statutes; and

B. There was no promise of financial obligation to any "person"; and

C. The statement was addressed to the public at large as opposed to any one entity or group of persons.

THIRD DEFENSE

In the alternative, if the statement made by Defendant-Contestee could be considered a minor technical violation

of the statute, it should still be no ground to void the election, because the Defendant-Contestee very promptly retracted the statement, and that retraction received greater publicity than the original statement (See statement dated August 19, 1979 attached hereto as Exhibit B).

FOURTH DEFENSE

The Plaintiff-Contestant has no standing to bring this action seeking to void the election of the Defendant-Contestee in that the Plaintiff-Contestant was himself guilty of violating the Corrupt Practices Act in at least the following instances:

A. He pledged to support a collective bargaining ordinance for county employees in return for the endorsement and support of the Greater Louisville Labor Council; and

B. He pledged to support a collective bargaining ordinance for county employees in return for the endorsement and support of the Department of Human Resources Employees Association; and

C. The sign or decal on a locomotive driven by the candidate or on his behalf throughout the campaign did not contain the required disclaimer language, to-wit: "Paid for by . . ."; and

D. The Plaintiff-Contestant, Earl J. Hartlage, failed to file copies of his pre-election and post-election reports of receipts and expenditures with the Jefferson County Court Clerk, which is mandatorily required under the Corrupt Practices Act.

FIFTH DEFENSE

That the Defendant-Contestee had the right to make the statement which was made on August 15, 1979, under the United States and Kentucky Constitutional provisions

guaranteeing the right of freedom of speech, equal protection of the laws and the provisions providing for free and equal elections; any application of any provisions of the Corrupt Practices Act which might tend to restrict the making of such statements by candidates for public office would be unconstitutional.

WHEREFORE, the Defendant-Contestee demands:

1. That the Petition seeking to void his election be dismissed;

2. That this case be accorded priority over all other cases pending in the division of this Court;

3. All other proper relief to which he may appear entitled.

Richard D. Remmers
Henry S. Johnson
R. Michael Pitt
2307 Citizens Plaza
Louisville, Kentucky 40202
589-6300
Counsel for Defendant-Contestee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was served on Victor L. Baltzell, Jr., Counsel for Plaintiff-Contestant, 219 Marion E. Taylor Building, Louisville, Kentucky 40202, by hand-delivering a copy to him this 31st day of December, 1979.

Counsel for Defendant-Contestee

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL W. BROWN - - - - - - - *Defendant*

AMENDED ANSWER

Comes the Defendant, Carl W. Brown, by counsel, and for his first Amended Answer states as follows:

1. Defendant reaffirms and reiterates each and every allegation contained in his original Answer, as though set out verbatim herein.

2. As an additional defense, Defendant states that the Plaintiff, on or about February 23, 1979, accepted a campaign contribution in excess of $100.00, in the form of cash, in violation of the Kentucky Corrupt Practices Act.

WHEREFORE, Defendant demands the relief sought in his original Answer.

Henry S. Johnson
Handmaker, Weber & Meyer
2307 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-6300
Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been hand delivered this 24th day of January, 1980, to Mr. Victor L. Baltzell, Jr., Attorney for Plaintiff, 219 Marion E. Taylor Building, Louisville, Kentucky 40202.

Henry S. Johnson

APPENDIX I

FOR RELEASE AUGUST 15, 1979

10:30 am

Press Contact: Steven Mobley 584-7111

PRESS CONFERENCE

August 14, 1979

BILL: As we stand here beneath the statue of George Rogers Clark, we are reminded of the spirit that guided our forefathers: the spirit that encompassed the ability both to conserve limited resources and to take bold steps when decisive action was required.

CARL: Unfortunately, it seems that the strength of this spirit has grown somewhat weak with the passage of time. With few exceptions, there has been little to illuminate the halls of our public institutions, only sparks resulting from the friction of discord. More often than not, we have been subjected to officials who merely offer lip service to austerity, while stuffing their wallets and taking incredible liberties with our tax dollars. The raises the county commissioners have given themselves in recent years and, even more recently, their hiring of an "executive assistant" are two cases in point.

Recent debate over the salaries of the County Police and other county employees has uncovered the widely-held belief that county employees are underpaid. There are, however, three part-time county commissioners. With state law limiting their authority and responsibility to legislation (KRS 67.080), it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that the part-time commissioners nevertheless see fit to pay themselves

the same amount as that paid the full-time county judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify those payments. The intolerable salary increases began three years ago under Hollenbach, with the persistent efforts of Commissioner Hartlage to elevate his own office. At a fiscal court meeting in 1976, Hartlage led a surprise move to abolish an office created by Hollenbach and more than double the salaries of the county commissioners! His actions demonstrated his unmistakable disrepect for the office of the chief executive of this county and his utter disdain for the spirit of laws that govern our county system. In typical neanderthal style, using the grey fringes of the law for his own personal gain, Hartlage led the move to funnel county tax dollars into commissioners' pockets.

BILL: Subsequent county commissioners have implied approval of this ridiculous arrangement by making no move to change it. They ignore the fact documented by the Kentucky Association of Counties, that Jefferson County is the only county in the entire state that pays its part-time fiscal court members the same salary as that paid our full-time county judge.

We abhor the commissioner's outrageous salaries. And to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the tax payers $36,000 during our first term of office, by $3,000 each per year.

The current commissioners' wasteful tendencies extend beyond their own salaries. Their creation of the $34,000 a year post of executive assistant reflects further fiscal extravagance and a tendency to overstep their legal authority. The position is nothing more than a thinly disguised political campaign manager paid with public funds. It will be abolished as soon as we take office.

In its place, we will organize a staff composed of three legislative assistants, one for each commissioner, as well as the necessary clerical staff. Instead of having *one* lavishly paid assistant trying to serve *three* masters who have widely divergent views, we will have three legislative assistants who will assist the respective commissioners with budget and legislative review, the proper responsibilties of the commissioners. An idea staff set up, it can be implemented by using the dollars currently allotted to the commissioners' office and slightly readjusting staff responsibilities.

CARL: These two proposals—cutting our own salaries and reorganizing the commissioner's office staff, will save the taxpayers over $172,000 during our term of office.

We make these statements fully aware that the office we intend to occupy should set the tone for the type of public officials we intend to be.

Under our guidance, extravagance at public expense will be a thing of the past, and responsibility and integrity will be our watchwords, Progress through Cooperation our theme.

APPENDIX J

PRESS RELEASE

August 19, 1979

Dr. Bill Creech

and

Carl Brown

Last Wednesday we stood beneath the statue of George Rogers Clark to make the point that we embrace the philosophy of conservation of limited resources, and made a pledge to reduce government spending, beginning with the Commissioners' office.

Today, we stand beneath the statue of Honest Abe Lincoln to emphasize something that will be a hallmark of our tenure in office: openness and candor.

Last week, we pledged to reduce the Commissioners' salaries because we are committed to responsible government spending, and because we abhor the greed displayed by Hartlage's doubling of his own salary soon after taking office. And now, to our surprise and dismay, we find that, at least in some instances, attempts at good government may not be legal.

We are men enough to admit when we've made a mistake.

We have discovered that there are Kentucky court decisions and Attorney General opinions which indicate that our pledge to reduce our salaries if elected may be illegal.

This has to be one of the most ridiculous lines of court decisions we have ever seen. Why should it be illegal for us to promise that if elected we will cease being the only one of Kentucky's 120 counties which pays its part-time county commissioners the same amount of money as its full-time County Judge/Executive? Why should we not

be able to reduce government waste wherever we find it? Why shouldn't we be able to cut our own salaries? This appears to us to be a sweetheart deal with one group of politicians protecting other politicians. A classic "you scratch my back, I'll scratch yours."

However, being lawabiding citizens and being pledged to enforcing all laws, we do hereby formally rescind our pledge to reduce the County Commissioners' salary if elected and instead pledge to seek corrective legislation in the next session of the General Assembly, to correct this silly provision of State Law.

We regret having to take this action, but we regret even more the circumstances which led to this whole episode—Earl Hartlage doubling his salary shortly after his election.

While a political line of court cases may cause us a setback in this situation, we refuse to be sidetracked from the overriding issue—government wasting tax dollars. Time and time again we have seen Judge McConnell rebuffed in his efforts to reduce government spending. We are running to provide the citizens of this community an independent, but cooperative, Fiscal Court. We truly believe in our campaign slogan—"Progress Through Cooperation."

APPENDIX K

Rule 76.30 Mandate

(1) **Definition.** The mandate is a writ of the appellate court, issued by the clerk and directed to the court from which the appeal was taken, which makes effective the opinion disposing of the appeal. The issuance or recall of such mandate is within the discretion of the court.

(2) **Time for Issuance.**

(a) A mandate of the Supreme Court shall be issued on the 21st day after the date its opinion was rendered unless a petition under Rule 76.32 has been timely filed. A mandate of the Court of Appeals shall be issued on the 41st day after the date its opinion was rendered unless a petition under Rule 76.32 or a motion for review under Rule 76.20 has been timely filed.

(b) In the event of a timely motion for discretionary review under Rule 76.20, the mandate shall be issued forthwith after denial of the motion, but if the motion for discretionary review is granted, there will be no mandate from the court whose decision is to be reviewed; and

(c) In the event of a timely petition under Rule 76.32, (i) if it is in the Supreme Court and is denied, the mandate shall be issued forthwith upon such denial, but if the petition be granted and a new opinion rendered, the mandate shall be issued on the 21st day thereafter unless a further petition under Rule 76.32 has been timely filed or unless the time for such filing has been extended; (ii) if it is in the Court of Appeals, the mandate shall be issued on the 21st day after the date on which the petition was denied unless a motion for discretionary review under Rule 76.20 has been timely filed, and on the 41st day after the date on which the petition was granted unless a further petition

under Rule 76.32 or a motion for discretionary review under Rule 76.20 has been timely filed.

(d) Unless otherwise ordered, (i) in no event shall a mandate issue pending final disposition of a timely motion for discretionary review under Rule 76.20 or a timely petition under Rule 76.32; and (ii) in every case it shall issue when no such motion or petition has been filed within the time allowed for that purpose.

(e) Upon issuance of the mandate the clerk shall forthwith send it to the court from which the appeal was taken and send a copy of it to each attorney of record. The clerk of the latter court shall forthwith file the mandate in the original record and note the filing on the proper docket; and

(f) No mandate shall be required to make effective a final decision of an appellate court entered by order. A decision styled as an "Opinion and Order" shall be deemed an order.

(Adopted October 14, 1977, effective January 1, 1978.)

APPENDIX L

Rule 76.44 Stay Pending Review by United States Supreme Court

The taking of an appeal to the Supreme Court of the United States or the filing in that court of a petition for review on a writ of certiorari will not be cause for withholding or recalling a mandate. An order staying execution and enforcement of a mandate, or of an order granting relief, may be entered upon motion under the following circumstances and conditions and for the periods designated:

(a) When an appeal is taken to the Supreme Court of the United States by the filing of a notice of appeal with the clerk of an appellate court as required by Rule 10 of the Rules of the Supreme Court of the United States and otherwise in accordance with Part IV of the Rules of that court, a stay during the pendency of the appeal may be granted on motion by any judge of the appellate court. The stay may be conditioned upon the giving of security to be fixed and approved by the judge that the appeal will be duly perfected and prosecuted as required by the Rules of the Supreme Court of the United States, and if the stay is to act as a supersedeas, a supersedeas bond shall be required in accordance with Rule 18 of the Rules of the Supreme Court of the United States. (Supreme Court Rules may be found in 28 U.S.C.A. Rules, Supreme Court); and

(b) When a party desires to make application for a writ of certiorari, a stay may be granted by any judge of the appellate court for such specified number of days not exceeding 90, as may reasonably be required to enable the writ to be obtained, and may be conditioned upon the giving of adequate security as specified in Title 28, Section 2101(f), U. S. Code.

APPENDIX M

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
No. 79-CI-11292

ORDER—Entered December 10, 1980

The appellee, having moved for immediate relief staying or recalling the mandate of this court issued or to be issued in the above-styled proceedings, and it appearing that the enforcement of such mandate should be stayed until a hearing can be held upon the motion, it is hereby ORDERED that the enforcement of the mandate of this Court be STAYED pending further orders of the Court. A hearing upon the motion will be held at 10:00 a.m., December 16, 1980, at the Central Office of the Court of Appeals, 403 Wapping Street, Frankfort, Kentucky.

(s) Roy N. Vance
Judge, Court of Appeals

APPENDIX N

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

ORDER—Entered December 16, 1980

BEFORE: WILHOIT, VANCE, and WINTERSHEIMER.

The appellee, having moved for immediate relief staying or recalling the mandate of this Court which issued on December 10, 1980, in the above-styled proceedings, and the Court having heard argument of counsel, it appears that the enforcement of such mandate of this Court should be STAYED until March 9, 1981, and the Court being sufficiently advised, it is so ORDERED.

(s) Anthony M. Wilhoit
Judge, Court of Appeals

APPENDIX O

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
No. 79-CI-11292

ORDER—Entered December 16, 1980

BEFORE: WILHOIT, VANCE, and WINTERSHEIMER, JUDGES.

This cause having come before the Court on motion for leave to substitute Fred M. Goldberg and Jonathan D. Goldberg, as counsel for the appellee herein, Carl W. Brown, and it appearing that the firm of Handmaker, Weber & Meyer, and the said Carl W. Brown have agreed to such motion, and the Court being otherwise sufficiently advised, it is hereby so ORDERED.

(s) Anthony M. Wilhoit
Judge, Court of Appeals